

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

BH SERVICES INC.,
For itself as Sponsor and Fiduciary
and for the BH SERVICES, INC.
HEALTH AND WELFARE PLAN,

Plaintiffs,

v.

FCE BENEFIT ADMINISTRATORS
INC., TRUST MANAGEMENT
SERVICES, ACEC MW AND
TRANSAMERICA LIFE INSURANCE
COMPANY

Defendants,

CIV. 16-5045-JLV

**REPLY IN SUPPORT OF FCE
BENEFIT ADMINISTRATORS,
INC.’S MOTION TO DISMISS
COMPLAINT**

I. INTRODUCTION

The Motion to Dismiss (Documents 20-22) the original Complaint (Document 1), previously filed by Defendant FCE Benefit Administrators, Inc. (“FCE”), was rendered moot when Plaintiffs filed their First Amended Complaint (Document 28) on October 28, 2016.¹ For some unknown reason, however, Plaintiffs nevertheless filed an Opposition (Document 32) to FCE’s Motion to Dismiss on November 1, 2016, after filing their First Amended Complaint. FCE files this reply out of an abundance of caution, asking this

¹ FCE’s Motion to Dismiss was originally filed in error on October 7, 2016 (Documents 17-18). FCE subsequently re-filed the corrected Motion and supporting documents (Documents 20-22) on October 11, 2016 after receiving notice of the error on that date.

Court to disregard Plaintiffs' Opposition as the previously filed Motion to Dismiss the original Complaint is now moot.

II. LEGAL ARGUMENT

Filing an amended complaint while a motion to dismiss is pending renders the motion to dismiss moot. *See Janis v. Nelson* 2009 WL 4505933 at *1 (D.S.D. Nov. 24, 2009) ("Because these motions to dismiss were filed prior to and do not address plaintiffs' first amended complaint, the motions to dismiss are rendered moot."); *Onyiah v. St. Cloud State U.*, 655 F. Supp. 2d 948, 954 (D. Minn. 2009) ("[A]s a general proposition, if a defendant files a Motion to Dismiss, and the plaintiff later files an Amended Complaint, the amended pleading renders the defendant's Motion to Dismiss moot." (citations omitted)). Accordingly, FCE's pending Motion to Dismiss the original Complaint (Document 1) became moot when Plaintiffs filed their First Amended Complaint (Document 28) on October 28, 2016.

Plaintiffs appear to be seeking an advisory opinion relating to any Motion to Dismiss filed in response to the First Amended Complaint. This is, however, improper. FCE has now filed a Motion to Dismiss and Motion to Strike portions of the First Amended Complaint, and Plaintiffs should address any objections they may have to **that Motion** in an Opposition to **that Motion**.

FCE disputes arguments raised in the Opposition, including but not limited to arguments that the previously alleged causes of action for fraud and unjust enrichment are not preempted and that the cause of action for fraud was pleaded with sufficient

particularity. However, it would be improper for FCE to brief those issues in response to a now moot motion. Accordingly, FCE respectfully requests this Court disregard Plaintiffs' Opposition (Document 32), and refrain from issuing a ruling on FCE's Motion to Dismiss (Document 20).

III. CONCLUSION

Because FCE's Motion to Dismiss the original Complaint is now moot, FCE respectfully requests this Court disregard Plaintiffs' Opposition to and refrain from issuing a ruling on that Motion.

Respectfully Submitted this 14th day of November, 2016.

Goosmann Law Firm, PLC

/s/ Heather C. Sazama

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served via the Court's ECF system on November 14, 2016, upon counsel of record for parties.

By: /s/ Autumn Nelson
Autumn Nelson